TADMANSORI FLOOR COVERING SDN BHD

v.

SAMSIAH HASAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING MOTION NO: RI-25-81-2000]
5 AUGUST 2002

LABOUR LAW: *Industrial Court - Award - Setting aside - Application to refer questions of law to High Court - Application refused by Industrial Court - Whether Industrial Court committed error of law - Industrial Relations Act 1967 s. 33A*

This was an application for an order of *certiorari* to quash the award of the Industrial Court dismissing the applicant's application to refer questions of law to the High Court under s. 33 Industrial Relations Act 1967 ('the Act'). The facts were that the applicant/employer had dismissed the respondents on grounds that they were guilty of theft of certain carpets belonging to the applicant. Upon reference of the dispute to the Industrial Court ('the 1999 proceedings'), the Industrial Court ruled that the dismissal was without just cause or excuse and consequently made an award in respect thereof ('the 1999 award'). Dissatisfied, the applicant applied to the Industrial Court to refer three questions of law to the High Court under s. 33A of the Act ('the 2000 proceedings'). The application however was dismissed on the ground that the questions posed, not being questions that arose in the course of proceedings that resulted in the 1999 Award, came outside the purview of s. 33A ('the 2000 Award'). In this *certiorari* application to quash the 2000 Award, the applicant *inter alia* argued that the Industrial Court, in refusing to refer the three questions of law to the High Court, had committed an error of law in that it had failed to take into account certain relevant considerations, namely the points raised in the written submissions of the parties in the 1999 proceedings.

Held (dismissing the application):

[1] The points raised in the written submissions of the parties in the 1999 proceedings were not before the Industrial Court in the 2000 proceedings. It therefore follows that there was no failure on the part of the Industrial Court to take into account relevant consideration - and therefore there was no error of law on its part - since the relevant considerations were not before it to be taken into account. (p 757 h)

[2] Even if a question of law did arise in the course of the 1999 proceedings as to whether, according to the Penal Code, intention of permanent deprivation is required for theft, it was an irrelevant question that did not call for determination of the Industrial Court. Even if the Industrial Court did determine it by saying that such an intention was necessary, the question was not, according to paragraph (b) of s. 33A, "one the determination of which by the Court has affected the award". Therefore, the question of law did not qualify for reference to the High Court. (p 760 d-e)

Case(s) referred to:

Queen-Empress v. Sri Churn Chungo ILR 22 Cal 1021 ***(refd)***

Tadmansori Floor Covering Sdn Bhd v. Samsiah Hasan & Ors [1999] 3 ILR 510 (Award No. 687 of 1999) ***(refd)***

Tadmansori Floor Covering Sdn Bhd v. Samsiah Hasan & Ors [2000] 2 ILR 211 (Award No. 391 of 2000) ***(refd)***

Ward & Anor v. PP [1953] 19 MLJ 153 ***(refd)***

Legislation referred to:

Industrial Court Rules, r. 24B
Industrial Relations Act 1967, ss. 30(5), 33A(1)
Penal Code, ss. 23, 24, 378

For the applicants - Ang Gim Yan; M/s SB Cheah & Assocs
For the 1st, 2nd & 3rd respondents - P Vickneswaren (Juanita Chuan); M/s Murugavell Arumugam & Co

Reported by Rusnah Aziz

JUDGMENT

Abdul Aziz Mohamad J:

This was an application for an order of *certiorari* to quash Industrial Court (Award No. 391 of 2000) dated 26 July 2000, which I shall call "the 2000 award". Since that award concerned an earlier (Award No. 687 of 1999) dated 17 December 1999, I shall deal first with that earlier award, which I shall call "the 1999 award". I shall refer to the proceedings that resulted in the 1999 award and the 2000 Award as, respectively, "the 1999 proceedings" and "the 2000 proceedings".

The 1999 award concerned the dismissal of the first three respondents by their employer, the applicant company, which those respondents alleged was without just cause or excuse. The Chairman of the Industrial Court said that the applicants' case against them was that they had jointly committed the offence of theft and he set out the following particulars of the offence, which were exactly as set out in the applicants' statement in reply:

i) On 25th January, 1997 the First Claimant had without permission or lawful authority, instructed the Company's transporter to deliver one roll of carpet to the First Claimant's residence and this roll of carpet was subsequently sold by the First Claimant.

ii) On Sunday 26th January, 1997 the Second and Third Claimant [sic] came to the Company's warehouse and without permission or lawful authority samples and rejects. These goods were then subsequently sold by the Second and Third Claimants.

The three respondents were dismissed two days later, on 28 January 1997, after a domestic inquiry which may have been held on that date itself. The first respondent was a general clerk, the second a general labourer and the third a maintenance worker.

It will be observed that particulars No. (i) concern "one roll of carpet" and that particulars No. (ii) concern "samples and rejects" but do not state what it was that was done concerning them without permission or lawful authority. I should also mention that the 1999 award is not consistent as to the relationship between the subject of the alleged offence, the date, the alleged act, and the alleged doer. I give a few examples. Reading the second paragraph at p. 4 of the award, one may think that the subject was "the carpet", the act was that of "taking ... out" and the doers were the three respondents. Reading the third paragraph at p. 4, one may think that what was taken out on 26 January 1997 was "the carpet" and that it was taken out by the second respondent. Reading the last two sentences before the complete paragraph at p. 9, one may think that what was taken on 25 January 1997 was "the carpet" and that it was taken by the three respondents. There is no further mention of the "samples and rejects" that are mentioned in particulars No. (ii) although there is, in the third sentence of p. 9, a mention of "reject carpets" in relation to past occurrences. From the second and third lines of p. 6, it may appear that the items involved were carpets "known as Strawberry Odyssey, Paragon and Barry" from an old stock. But all that I have said in this paragraph was not in issue in this application, so that for the purposes of these grounds I shall assume that the subject matter of the alleged offence was carpets, and that they were removed by the three respondents on 25 or 26 January 1997.

In the second paragraph at p. 4, the Chairman said that the three respondents admitted taking the carpets out of the applicants' premises and that "The only disputed fact by the claimants is the element of dishonest intent on their part".

After considering the case of the applicants, the Chairman considered the evidence of the first respondent, which is set out at p. 6. The gist of her evidence is this. The three respondents found some old stock of carpets and

decided to purchase them from the applicants. They tried to get the permission of one Mr Alex (COW1) but failed in their attempts to contact him. But the first respondent decided to take the carpets out all the same because on a previous occasion Mr Alex had told her that she could take out items provided she filled in a requisition form. So a requisition form was filled in, signed by the three respondents, with the statement "Kami akan bayar bila mendapat gaji untuk bulan ini". The first respondent affixed the requisition form on the soft-board behind her table in the office for Mr Alex's information.

In the first paragraph at p. 7 the Chairman said that it was the respondents' contention that it was an accepted practice in the applicant company for employees to buy carpets and pay later and that all that they had to do was to fill in the requisition form.

At the beginning of p. 8 the Chairman said, perhaps as a contention of the respondents, that the respondents had bought carpets before through Mr Alex and were allowed to pay later.

From the award, therefore, it is clear that the respondents' case was that when they took the carpets they were buying them on credit and that they believed, from past practice, that they could buy carpets on credit by filling in the requisition form.

The Chairman accepted their claim. This is what he said, beginning at the bottom of p. 8:

> It is a serious matter to accuse an employee of theft which is a criminal offence liable to be imprisoned under the law. **The ingredient of theft is taking someone's property wrongfully with intent to deprive that person permanently of the property**. The evidence in this case does not satisfy the ingredient of theft. 1st Claimant had been buying the Company's reject carpets previously, and paid when she was paid her salary. Similarly, COW1 had been buying carpet himself and instructed Miss Wong to deduct his salary for his purchase. The Claimants, like COW1, can buy and take the carpet home. As a procedure they should not do so without the permission or approval of Mr. Alex, COW1. Therefore the taking of the carpet on January 25, 1997 was not theft in the true sense because the Claimants believed they-had the right to buy it. The Claimants had left document indicating the intention to pay for the carpet.

I highlight the second sentence because it was that sentence that led to the present application. It is also to be noted that according to the Chairman the only wrong that the respondents did was failing to follow the procedure of obtaining the permission of Mr. Alex.

In the paragraph at p. 9 that follows that passage, the Chairman said that the purpose of the "so-called domestic enquiry" was to find out who were involved in selling cheap carpets because there had been rumours that the applicants' carpets were available for sale at reduced prices, and the applicants suspected it was the respondents. But the Chairman said, as his finding, "The claimants' consistent denial showed they were not involved".

The Chairman concluded with these findings at p. 10:

> .... In the face of the evidence before this Court the Company has failed to satisfy the burden of proving the Claimants have committed theft although they might have been negligent in not following proper procedure before removing the carpet.
>
> After careful consideration of the totality of the evidence and facts the Court concurs with the submission of the Claimants that they are not guilty of committing theft of the Company's property. Their dismissal on theft was without just cause or excuse.

The Chairman there again mentioned the respondents' failure to follow proper procedure, saying that they might have been negligent.

On 5 January 2000 the applicants applied under s. 33A of the Industrial Relations Act 1967 to the Industrial Court for reference of the following questions of law to the High Court:

1. whether ingredient of theft under the Malaysian criminal law applicable in the Industrial Court;
2. whether all the ingredient of theft must have been proven before a dismissal on ground of suspected theft is with just cause and excuse;
3. whether dismissal on ground of suspected theft is with just cause and excuse if evidence before the Industrial Court fails to prove all ingredient of theft but yet a serious misconduct has been proven.

Subsection (1) of s. 33A provides as follows:

> (1) Where the Court has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law:
>
> (a) which arose in the course of the proceedings;
>
> (b) the determination of which by the Court has affected the award;
>
> (c) which, in the opinion of the Court, is of sufficient importance to merit such reference; and

(d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.

There are four requirements for a question of law for it to be qualified to be referred by the Industrial Court to the High Court. The first requirement, in para. (a), is that the question of law arose "in the course of the proceedings", which in this case were the 1999 proceedings. If any of the requirements is not satisfied, the question of law does not qualify for reference under the section.

The application for reference was made by the Form U that is prescribed by r. 24B of the Industrial Court Rules 1967. That rule governs the procedure for applications under s. 33A, but it merely provides for the use of Form U, for the fixing and notification of the hearing of the application and for service of copies of the application. Form U itself is designed only for the setting out of the question of law. Therefore, at the hearing of the application, which was before the President of the Industrial Court and two panel members, the material that was before the court and that was available for reference in submission were the Chairman's 1999 award and the Form U. The applicant company did not take steps to have the full records of the 1999 proceedings available before the court in the 2000 proceedings.

The applicants' application under s. 33A resulted, after it was heard, in the 2000 award that the applicants now sought to have quashed. By that award the Industrial Court dismissed the application on the ground that none of the three questions arose in the course of the 1999 proceedings.

Dealing with the first question of law, the President referred to the statement of the Chairman in the 1999 Award that I have highlighted earlier - "The ingredient of theft is taking someone's property wrongfully with intent to deprive that person permanently of the property" - and said that, according to the applicants' counsel, that was the position under the Indian Penal Code whereas the definition of theft under our Penal Code was different. The President set out the following as the position under our Penal Code as contended by the applicants' counsel:

> Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moved that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft." When section 378 of the Penal Code is read this way it is evident that it was the intention of the Legislature

> that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them.

The President then said:

> The Court is of the opinion the [first] question did not arise in the award. The Court may have used different law. If the Company is unhappy about it then it should apply to quash the award on the ground the learned Chairman was wrong in law.

As to the second and third questions of law, the President said this:

> With regard to the second and third questions learned Counsel for the Company referred the Court to page 10 of the Award where he said the learned Chairman found the Claimants guilty of misconduct although it was proven that they were not guilty of theft. On this basis the Company wants to refer to the High Court the second and third questions. Again the Court is of the opinion that these questions did not arise in the course of the proceedings resulting in the award. To satisfy this condition required under this section these questions must have been before the Court argued upon by the parties and decided by the Court. The questions posed by the Company did not satisfy this condition.

The applicants' counsel submitted before me that in refusing to refer the three questions to the High Court, the Industrial Court committed an error of law hi that it failed to take into account relevant considerations. It was not the argument of the applicants' counsel that the "relevant considerations" that the Industrial Court omitted to take into account were matters that were apparent to the Industrial Court from the material before it, namely the 1999 Award and the Form U. The "relevant considerations" that counsel relied on were points in the written submissions of the parties in the 1999 proceedings, which written submissions were not before the Industrial Court in the 2000 proceedings. By implication, the applicants' counsel accepted that on the material that was before the Industrial Court in the 2000 proceedings, the Industrial Court did not fail to take into account relevant considerations and therefore did not commit an error of law in refusing to refer the three questions to the High Court.

I was of opinion that there was no failure on the part of the Industrial Court to take into account relevant considerations, and therefore there was no error of law on its part, since the relevant considerations were not before it to be taken into account. For that reason I dismissed the application for *certiorari* to quash the 2000 award.

The applicants' counsel argued that the rules governing an application to the Industrial Court for a reference to the High Court under s. 33A were such that it was inevitable that the material before the Industrial Court in the 2000 proceedings could only be the 1999 award and the Form U, that the Industrial Court should have taken the initiative to have the full records of the 1999 proceedings before it and that its failure to do so constituted a procedural impropriety on its part that provided grounds to quash the 2000 award. I rejected that argument. If the applicants had intended to rely on written submissions in the 1999 proceedings to show that the questions of law did arise in the course of the proceedings, it was they who had to take the initiative to ensure that the written submissions were before the court. As it was, they were not, and the submissions on the application for reference were necessarily confined to the 1999 award and the Form U.

The applicants' counsel also submitted that the High Court should not deny relief on purely technical and narrow grounds but should endeavour to do justice. But the applicants chose to question the 1999 Award by way of s. 33A and sought judicial review of the decision on their application under the section on the ground that the Industrial Court had committed an error of law. If they could not show that the Industrial Court had committed an error of law, they could not have judicial review.

So that the "relevant considerations" do not remain a mystery and with the hope of showing that my dismissal of the applicants' application may not necessarily have occasioned injustice, I shall nevertheless venture to consider the relevant considerations and their effect.

I shall take the first question of law first.

The passage on the position of the law of theft under our Penal Code that was cited in the 2000 award as relied on by the applicants' counsel is actually the headnote to *Ward & Anor v. PP* [1953] 19 MLJ 153, where the applicants in that case, who had been convicted of theft, contended that they acted without criminal intention and that it would be no offence if the owner of the articles taken had been deprived of possession of them for a short time. Storr J came to the conclusion that there was very little substance in the argument. He supported his conclusion by considering the definition of "theft" in s. 378 of our Penal Code, the definition in s. 24 of the word "dishonestly" that appears in s. 378, and the definitions in s. 23 of the terms "wrongful gain" and "wrongful loss" that appear in s. 24. He then quoted what Petheram CJ stated in *Queen-Empress v. Sri Churn Chungo* ILR 22 Cal 1021 as being what 378 would read with the incorporation of ss. 23 and 24. The headnote to *Ward & Anor v. Public Prosecutor* is in fact a reflection of what Petheram CJ said.

As the headnote differs slightly from what, according to Storr J, Petheram CJ actually said, I shall quote Petheram CJ from the body of *Ward & Anor v. Public Prosecutor*:

> Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft". When the section is read in this way it is evident that it was the intention of the Legislature that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them.

In the 1999 proceedings the respondents' counsel submitted as follows:

> Yang Arif, the offence of theft is only committed when an employee takes his employer's property wrongfully with the intent to deprive the latter permanently of the property. If the employee has a right to take the property, no theft is committed.

The applicants' counsel, on the other hand, after considering ss. 378, 23 and 24 of our Penal Code, and several authorities, including *Ward & Anor v. Public Prosecutor*, concluded:

> Thus, Yang Arif, we hereby humbly submit that the element of **intention to deprive the Company's property permanently by the Claimants**, is not required in our Malaysian Penal Code. Accordingly, it is humbly submitted that the proposition of law as submitted by the Claimants is wrong. (Emphasis added).

It is those submissions that the applicants' counsel submitted before me was the relevant consideration in respect of the first point of law.

It is clear that the point that the applicants' counsel was trying to drive home in considering those provisions and authorities was that in our Penal Code an intention to deprive permanently is not required for theft. It is obvious that the applicants' counsel considered that that was the point of the respondents' case and of their counsel's submission. But that was not so. The respondents' counsel may have misstated the offence of theft in using the word "permanently", but it was not his point to say that the respondents did not commit theft because there was no intention of permanent deprivation. His case was: "If the employee has a right to take the property, no theft is committed".

The definition of the offence of theft was merely incidental and introductory.

The Chairman, as can be seen from the earlier-quoted passage beginning at the bottom of p. 8 of the 1999 award, agreed with the submission of the respondents' counsel. He found there was no theft because the respondents believed "they had the right to buy it". He did not base his finding on the consideration that there was no intention of permanent deprivation. In fact the question of intention of permanent, as opposed to temporary, deprivation was not even relevant to the case. There was permanent deprivation. It was not the respondents' case that they intended to take the carpets for only a short while. The Chairman's statement of the law that I have highlighted was merely an adoption of what the respondents' counsel submitted. But the statement was merely introductory. It may have been a misstatement because of the inclusion of the word "permanently", but it was not the Chairman's finding that there was no theft because there was no intention of permanent deprivation.

So even if a question of law did arise in the course of the 1999 proceedings as to whether, according to our Penal Code, intention of permanent deprivation is required for theft, it was an irrelevant question that did not call for determination and that the Chairman did not determine, and even if he did determine it by saying that such an intention was necessary, the question was not, according to para. (b) of s. 33A, one "the determination of which by the court has affected the award", because the finding that the respondents did not commit theft was not on the basis that there was no intention of permanent deprivation. Therefore the question of law did not qualify for reference to the High Court.

The only other "relevant consideration" is the following submission by the applicants' counsel in the 1999 proceedings:

> Therefore, in the event that the Company failed to prove all the elements of theft, we humbly submit that the misconduct on the part of the Claimants warrant the dismissal as the taking out of the carpet against the Company's procedure was clearly a serious breach of the Claimants' contractual duty owed to the Company.

That, I think, is relevant to the third question. It is not relevant to the second question. My attention was not directed to any other submission that can properly be treated as a relevant consideration for the second question.

It is true that the third question of law did arise in the course of the 1999 proceedings, but I do not think that the applicants' failure to have it referred to the High Court has resulted in manifest injustice to them. The chairman

clearly accepted the respondents' explanation that they took the carpets because they believed they were allowed to do so, and that they did it in all innocence and openly as evidenced by the fact that they left the requisition form on the soft-board so as to let Mr Alex know of what they had done. Those findings of fact had not been challenged since the applicants did not seek judicial review of the 1999 award. The Chairman recognised that in doing what they did the respondents were negligent and in breach of correct procedure. In all probability the Chairman did recall the submission of the applicants' counsel and the need to decide whether the respondents' negligence and breach of procedure was a serious breach of the respondents' contractual duty to the applicants. Being influenced by the essential innocence of the respondents in mind and motive, it is probable that, bearing in mind his duty to act "according to equity, good conscience and the substantial merits of the case" as he was required to do by s. 30(5) of the Industrial Relations Act 1967, he did not consider the fault of the respondents to be such a serious breach of the respondents' contractual duty as to justify dismissal. Had that been the thinking of the Chairman it would not be easy to say that he was wrong in law.